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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re DIANE S., a Person
Coming Under the Juvenile
Court Law.

B293585

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct.
No. 18CCJP05761A)

Plaintiff and Respondent,

v.

CLARISSA C.,

Defendant and Appellant.

APPEAL from an order of the Juvenile Court of Los Angeles County, Kim Nguyen, Judge. Reversed.

Megan Turcot Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Clarissa C. (mother) appeals from the orders of the juvenile court taking jurisdiction over her eight-year-old daughter Diane S. (Diane) under Welfare and Institutions Code section 300, subdivision (c),¹ removing the child from her custody and ordering her to undergo a reunification program. We conclude that the juvenile court improperly found mother to have engaged in offending parental conduct based solely on Diane's reaction to it. Accordingly, we reverse the jurisdiction order.

FACTUAL AND PROCEDURAL BACKGROUND

I. Family history

Mother was not yet 16 years old in 2011 when she gave birth to Diane. Mother has since had three more children. Only Diane is the subject of this dependency and a party to this appeal.

In 2015, the juvenile court sustained a petition alleging that mother sexually abused then four-year-old Diane by exposing the genitals of mother and mother's then companion to the child, and by engaging in sexual acts, including oral sex, with her companion in front of Diane. The companion ejaculated on mother's face. Further, the companion sucked on the child's neck. Aware that the child was witnessing this conduct, mother failed to protect her. The court also found true the allegations

¹ All further statutory references are to the Welfare and Institutions Code.

that mother engaged in domestic violence with the companion and left Diane and her younger brother without adequate supervision. (§ 300, subds. (a), (b), & (j).)

As part of family reunification services, the juvenile court's August 2015 order required mother to undergo domestic violence and parenting classes.² Mother completed a parenting course and therapy in the summer of 2016. In therapy, mother addressed child safety and protection, "mate selection," the characteristics of healthy relationships, domestic violence, and "healthy boundaries that need to exist in a home in order for [mother] to protect herself and her children." Mother ended her relationship with the companion named in the 2015 petition. However, bed ridden and periodically hospitalized because of high risk pregnancies, mother was unable to visit Diane during the first dependency.

The juvenile court terminated jurisdiction and placed Diane and her younger brother with their respective fathers who were nonoffending. Diane went to live with her father, and saw mother during supervised visits. The child also underwent therapy, which ended because father found a second job that interfered with scheduling. Diane's therapist had no concerns about terminating the treatment because of the child's progress.

² The juvenile court in 2015 also ordered mother to undergo substance abuse counseling and weekly random drug testing. Notwithstanding mother told the social worker in 2018 that she completed the drug component of her 2015 case plan, and notwithstanding there was no suggestion of substance abuse in 2018, the Department of Children and Family Services (the Department) required mother to submit to drug testing in 2018. Mother tested and produced negative results.

Recently, mother sought to regain custody of Diane. In March 2018, the family court granted mother unmonitored daily visits every other weekend.

II. The current petition

Four months later, in July 2018 when Diane was seven years old, the Department received a report alleging an incident in which mother sexually abused the child. Diane told the investigating social worker that mother came out of the shower wearing only a towel. Mother's boyfriend (a different companion than in 2015), picked mother up, exposing her buttocks to the child. Diane started crying and hid under her half-brother's crib. She has seen mother and the boyfriend kiss, and once she heard mother laughingly tell him to stop, and he responded, " 'no.' " Also, Diane once saw a red mark on mother's neck because the boyfriend bit mother. The child felt uncomfortable seeing mother and the boyfriend argue—which happens a lot—, or kiss. In contrast, father and his girlfriend never kissed in the child's presence. Diane loved mother but did not like visiting and only did so because she had to. She liked living with father because he never made her feel uncomfortable.

Law enforcement interviewed all parties and determined that father's report of sexual abuse was unfounded. Finding mother's action to be inappropriate, the police suggested to father that he could raise the incident with a judge in a custody hearing.

Father told the social worker that after mother's visits were liberalized, Diane indicated that she felt uncomfortable during visits. The child came home from the July 2018 visit crying about mother's inappropriate behavior in front of her, which caused father concern given the child's past trauma resulting from mother's conduct. He believed that mother and her boyfriend

were naked and had sexual intercourse in front of Diane. Father enrolled the child in therapy. He asked that mother's visits be supervised again. Diane denied these allegations to the social worker.

Mother described the events of July 2018. Mother's boyfriend wanted mother to hurry after her shower because the family was late to see a movie. He picked her up and sat her on the bed. Her toddler son thought the two were playing and jumped on top of her. Diane began to cry and hid under the crib. Mother quickly went to the child and asked her what was wrong. Diane responded that it " 'was rude' " for mother's boyfriend to carry mother. Surprised by Diane's reaction, mother apologized and told Diane it would not happen again. The child went to the movie and enjoyed it. Mother did not feel that her affection with her boyfriend was inappropriate. Diane is jealous when other children approach mother and is in constant need of attention. Mother insisted that she was generally not affectionate with her boyfriend and the two keep a distance from one another around the children. Mother's boyfriend confirmed mother's statements. The social worker found no signs of abuse or neglect of Diane's two younger half-siblings.

Mother suspected that father constantly questioned Diane and jumped to conclusions. She claimed that father exaggerated and lied about her. Unable to communicate with each other, mother and father use the Talking Parents application to communicate over the internet. Still, father continued to call mother names.

According to maternal grandfather, who lives in the same house with mother, Diane had not disclosed any type of abuse or complained about mother. Rather, the child was playful and

cried when it was time to return to father. Maternal grandfather added that mother is attentive and appropriate with the children. He believed that father might be asking Diane questions about her visits with mother and might be misinterpreting the child's responses.

Paternal grandmother indicated that Diane wanted mother and father to reconcile and was very jealous of other men around mother. The child wanted to visit mother but did not like it when the boyfriend was present. Paternal grandmother was concerned about Diane's mental health. She reasoned that mother's inappropriate behavior was emotional abuse because Diane had stated she wanted to kill herself when she saw mother with another man, was scared, and had trouble sleeping when she came home from visits with mother. Also, Diane appeared to be scared of men she saw in the street. Diane denied having any suicidal thoughts.

A social worker from the first dependency opined that Diane was traumatized by witnessing mother and her then boyfriend having sexual intercourse. Hence, it made sense that the child still did not feel comfortable witnessing mother kiss any man. The social worker from the previous dependency recommended to the new social worker that mother attend a sexual abuse awareness class and learn ways to help Diane deal with her past trauma.

Diane's new therapist, Julia Sabotin, saw the child in July 2018. Diane appeared to Sabotin to be very anxious. The child was uncomfortable when mother held hands with, talked to, or kissed her partner on the cheek or mouth "because [Diane] reported 'she does not know what would happen next.'" The child did not act nervous or worried, but reported feeling she

could not breath or would cry when mother showed affection with her boyfriend. With respect to the July 2018 incident, Diane did not report that mother and the boyfriend were naked or getting undressed. Diane was not bothered by father's show of affection with his girlfriend. Sabotin sensed that father was prompting Diane. The child appeared scared if she did not tell father about bad things during her visits with mother. Sabotin witnessed Diane's nervousness in father's presence. The therapist believed that mother had not been inappropriate and that Diane was placed in the middle of a custody battle as it appeared that father's goal was to get mother's visits to be monitored. Sabotin wanted Diane and mother to have conjoint sessions to see how they interacted.

The social worker talked to mother about a voluntary family maintenance program because of concerns that Diane's past trauma continued to affect the child. In a team meeting, mother identified two goals: to undergo conjoint therapy with Diane to address case issues and past trauma and experiences, and to spend more time together. Mother agreed to voluntary family maintenance. After she spoke to her attorney however, mother was no longer comfortable with the voluntary program.

The Department concluded that there was a " 'very high' " risk to Diane's safety. It reasoned that mother's display of sexual play had caused the child to feel upset, anxious, and uncomfortable, and to have trouble sleeping. Moreover, the Department explained, although the family participated in a case plan between August 2015 and March 2016 based on similar allegations, mother failed to complete her court ordered services, including individual therapy to address appropriate sexual boundaries. The Department found that mother minimized the

dependency history and substantiated allegations. Thus, court intervention was necessary to ensure Diane's safety and mother's completion of services.

The Department filed its petition alleging that mother emotionally abused Diane by exposing her to sexual conduct with mother's boyfriend. "The sexual abuse by mother has caused the child to feel upset, anxious, uncomfortable, scared and [to have] trouble with sleeping. The child has expressed wanting to kill herself." Diane was previously a dependent of the court after being exposed to mother's sexual activity with mother's companion. (§ 300, subd. (c).) The petition did not name Diane's toddler brother, who had joined with mother and the boyfriend on the bed, or her baby brother.

The juvenile court detained Diane from mother and released her to father. It reimposed supervision for mother's visits, which were to occur once a week for two hours per visit.

III. The adjudication

According to the Department's last minute information for the court filed before the adjudication hearing, mother pointed out that father's report of the July 2018 incident was different than Diane's account. Mother insisted that "[n]othing happened and I just feel like no one is going to believe me." Mother agreed to cooperate but "I am not going to keep doing this. . . . I love my daughter but I just cannot be doing this over and over." Mother explained that the problem was that she and father could not get along and their discord was affecting their child. Father exaggerated everything which made Diane anxious. Mother did not "think anything about [her] needs to change." The solution was for mother and father to get along and for Diane to spend more time with mother.

After additional therapy sessions in September and October 2018, Diane's therapist reported that the child suffered from anxiety. Diane related that mother's boyfriend touched mother on her buttocks and Diane "was nervous about what would happen next." It appeared to the therapist that Diane was being questioned a lot about what was happening in mother's household. The therapist was not concerned about child abuse. Diane liked therapy and was amenable to mother's participation in her therapy, but without the boyfriend.

In October 2018, Diane reported that she did not want to have visits with mother.

IV. The contested adjudication hearing on October 24, 2018

Mother testified that the allegations in the first dependency included domestic violence and Diane's "being exposed to sexual . . . activity." Mother addressed the allegations sustained by the juvenile court in 2015 in her parenting classes and in therapy in 2016.³ Although she asked for a referral to a program to address sexual boundaries, the Department never told her she had to enroll in one until now. Nonetheless, she addressed sexual boundaries in therapy during the first dependency. Her therapist explained that if Diane was not comfortable with mother holding hands, hugging, or kissing her partner, that for Diane's sake, mother should not do it in the child's presence. Mother testified there is no holding hands or hugging, kissing, "or anything." She learned in therapy to "keep [Diane] comfortable at all times," something she has tried to do.

³ Mother appeared not to remember the allegations that the companion ejaculated on mother's face and that Diane saw mother's vagina and her companion's penis.

Mother believes that it was inappropriate to be naked in front of the children, but not inappropriate to be wearing a robe that covered her up. She believes it is never appropriate to have sex in front of a child. Mother never has sex with her current boyfriend when Diane is present. Mother's boyfriend has never exposed himself to Diane.

When Diane visits, mother's boyfriend spends time with his children so that mother and Diane can spend time alone and talk. Diane asks mother questions such as " 'does your boyfriend love you? Are you going to get married? But why are you married? Why are you not with my dad? Why is my dad with [his girlfriend]?' " The first thing mother does when Diane cries and shuts down is comfort her, hug her, and tell her to talk when she feels comfortable. Mother assures Diane that she will not judge her and that Diane does not need to talk if she is not inclined. Diane has reacted this way several times before, even when playing with other children. She would break down and complain about stomachaches or headaches and say that she did not feel comfortable.

Mother and father are unable to talk to each other and so she hired an attorney to move the family court to liberalize her visitation. Mother believed that the reason Diane was upset by the July 2018 incident was that she is in the middle of a custody battle and sees that her parents do not get along. Diane is conflicted about what she is supposed to say in front of each parent. The stress and pressure of this situation causes her to break down. She does not want to talk to mother about it. She stays quiet and cries. According to mother, Diane has always been very emotional. But, she is more so because of what is going on with her current circumstances. She is easily upset if mother

pays attention to her half-siblings. Mother agreed that the first dependency has something to do with Diane's feelings now.

V. The juvenile court's orders

The juvenile court sustained the petition and declared Diane a dependent under section 300, subdivision (c). The court considered the allegations of the first dependency and found that Diane was "traumatized. And because of that, *conduct which would normally seem acceptable to other children*, in many ways I think is damaging to Diane [S]." (Italics added.) "[T]aken *in a vacuum, kissing one's partner, hugging them, possibly play wrestling may not amount to offending parental conduct*" under section 300, subdivision (c). (Italics added.) However, evaluated in the context of the history of this case, the events of July 2018 were traumatic to Diane as they were "squarely reminiscent of what Diane had to see" in 2015. The court found that mother minimized the 2015 situation and lacked insight into what transpired with Diane, believing that the child was victimized by the domestic violence but not by the sexual conduct. Thus, mother's behavior in July 2018 constituted "offending parental conduct." Diane "has been abused, and . . . stands subject to continuing emotional abuse here with the parental conduct." The causation and emotional damage prongs were also met. The court ruled that mother needed continuing therapy so that Diane could remain safe.

The juvenile court removed Diane from mother's custody and released her to father. The court ordered mother to undergo sex abuse awareness counseling and individual therapy to address case issues and appropriate sexual boundaries. It ordered mother and father to participate in family therapy with mother's therapist, when appropriate, and to complete a co-

parenting class. Mother received supervised visits. Mother appealed.

DISCUSSION

The question at a section 300 hearing is whether, at the time of the hearing, the child is subject to the defined risk of harm, or may be so in the future. Evidence of past conduct may be probative of current conditions, but past conduct standing alone does not establish a substantial risk of harm absent some reason to believe the acts may continue in the future. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.)

A child falls within the definition of section 300, subdivision (c) when the “child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent.”

Subdivision (c) sanctions juvenile court jurisdiction “when parental action or inaction causes the emotional harm, i.e., when *parental fault* can be shown.” (*In re Alexander K.* (1993) 14 Cal.App.4th 549, 557 (*Alexander K.*), italics added.) The Department must prove three elements: “(1) the offending parental conduct; (2) causation; and (3) serious emotional harm or the risk thereof, as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior.” (*Ibid.*) The facts supporting jurisdiction focus on the behavior of the parent, not that of the child. (*Ibid.*)

The appellate court in *Alexander K.*, *supra*, 14 Cal.App.4th at page 558 was faced with the question, “how can a court evaluate whether a child of a ‘broken’ marriage suffers or is at risk of suffering serious emotional damage as a result of the

conduct of a parent—as opposed to the inevitable tensions that result from the marital dissolution itself and ensuing visitation disputes—when the offending conduct is not specified? What level or type of behavior triggers the statute under these circumstances?” (Italics omitted.) The legislative history of section 300, subdivision (c) and the purpose of the statute led the *Alexander K.* court to hold that “the parental conduct branch of subdivision (c) seeks to protect against *abusive behavior* that results in severe emotional damage. We are not talking about run-of-the-mill flaws in our parenting styles—we are talking about *abusive, neglectful and/or exploitive conduct toward a child* which causes any of the serious symptoms identified in the statute. ‘Abuse’ means ‘to ill-use or maltreat; to injure, wrong, or hurt.’ ” (*Id.* at p. 559, second italics added.)

Based on that definition, the *Alexander K.*, *supra*, 14 Cal.App.4th 549 court reversed the order declaring the child at issue a dependent under section 300, subdivision (c). The child was resistant to visiting the father. He hid behind the mother, locked car doors, and kicked and screamed, stated he did not want to see the father, vomited and complained of nausea following visits, and attempted to “‘French kiss’ ” his mother. The child’s therapist testified that the child was frightened of the father. (*Alexander K.*, at p. 560.) The appellate court repeatedly noted that none of these emotional reactions established abusive conduct on the father’s part posing a danger to the child. (*Ibid.*)

“Simply put,” the *Alexander K.*, *supra*, 14 Cal.App.4th 549 court stated, “none of the allegations which the court sustained support a finding under subdivision (c) because they *focus on the child’s behavior and reactions, not the father’s behavior*. There simply is no abusive conduct.” (*Id.* at p. 559, italics added.) The

Alexander K. court criticized the Department for “attempting to build its case around an unstated presumption that *in the absence of proof of abusive parental acts*, certain emotional disturbances in a child, under certain circumstances, will nevertheless be attributed to the fault of the parent. We do not think the Legislature intended to heighten the use and weight of inferences arising in dependency cases so as to pack the normal rules of circumstantial evidence against the parent.” (*Id.* at pp. 560–561, italics added.)

The same result obtains here. The juvenile court recognized that “kissing one’s partner, hugging them, possibly play wrestling may not amount to offending parental conduct,” and would normally be acceptable to other children. The police and Diane’s therapist agreed. Law enforcement concluded that what occurred in July 2018 was not sex abuse. Diane’s therapist, chosen by father, was not concerned about child abuse and found that mother’s conduct as described by Diane was *not inappropriate*. The Department implicitly reached the same conclusion because it did not name toddler brother in the 2018 petition or seek to have him removed from mother’s custody, even though he was present and participated in the play wrestling that day. It is true that the court also found that mother “minimized” the 2015 allegations and lacked insight into what occurred in 2015. But, if lacking insight into and minimizing a child’s feelings constituted offending parental conduct, then all narcissistic parents would lose custody of their children. The question is whether “[p]ersons of common intelligence” would conclude that the current conduct by mother constituted *maltreatment* of Diane to the point of severe emotional harm. (*Alexander K.*, *supra*, 14 Cal.App.4th at p. 559.) Play wrestling in

a towel, lacking insight into and “minimizing” allegations in an earlier dependency, although thoughtless, simply do not amount to maltreatment of Diane under the law.

Notwithstanding its concession that mother’s conduct was not offending under the statute, the juvenile court found, because Diane was traumatized by the alarming 2015 events in which mother participated, that the child’s understandable reaction to the July 2018 incident, by crying and hiding under the crib, justified jurisdiction under section 300, subdivision (c). Thus, the court focused on Diane’s behavior and reaction in finding otherwise nonoffending parental conduct to be offending conduct, in direct contravention of *Alexander K.* The Legislature unmistakably intended that the grounds on which children may be subjected to juvenile court jurisdiction be narrow. (*Alexander K.*, *supra*, 14 Cal.App.4th at p. 559.) A child’s fragile emotional state cannot be used to bootstrap a finding of offending parental conduct, an essential element of section 300, subdivision (c). As mother’s conduct was not “abusive, neglectful and/or exploitive” toward Diane. (*Alexander K.*, at p. 559), there was no offending parental conduct to justify jurisdiction under that statute and the concomitant intrusion of the Department into the lives of this family (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1324).

We recognize mother’s effort to change her life since 2015 by leaving her abusive companion, completing and putting into practice what she learned in her 2016 therapy and parenting classes, and by obtaining the reward of liberalized visits with Diane in 2018. We also recognize the juvenile court’s legitimate concern regarding the fragility of Diane’s emotional state and mother’s role in contributing to it. However, given mother did

not engage in offending conduct as defined in section 300, subdivision (c) in July 2018, we agree with Diane's therapist that this case is essentially a pitched custody battle in which the parents are vying for control of their child. The juvenile court recognized as much when it required as part of reunification that *both* parents participate in family therapy and complete a *co-parenting* course. But the juvenile court should not become the unwitting partner to this fight by allowing allegations of abusive behavior to become a means of leverage in a custody battle. (See *In re John W.* (1996) 41 Cal.App.4th 961.)

DISPOSITION

The order is reversed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.